15-51

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~483~~. 241

THE UNITED STATES, APPELLANTS,

vs.

JOHN SPICER.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER, 6, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 483.

THE UNITED STATES, APPELLANTS,

vs.

JOHN SPICER.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

Petition.

JOHN SPICER
vs.
THE UNITED STATES. } 5936. Filed April 17, 1869.

To the honorable the judges of the Court of Claims:

Your petitioner, John Spicer, who is a citizen of Illinois, residing in Ottawa, respectfully represents unto your honors:

That, on the 4th day of February, 1864, he entered into a contract with the United States, through Capt. James A. Ekin, chief quartermaster of the cavalry bureau, for the sale and delivery of one thousand cavalry horses at the Government stables, in Indianapolis, Indiana, by or before the 15th day of March, 1864, at the rate of $135 per horse, to be paid at the office of the Quartermaster United States Army, Washington, D. C.

Petitioner further states that on the same day he entered into another contract with the party aforesaid, for the sale and delivery of nineteen hundred cavalry horses at the Government stables at Columbus, Ohio, within fifty days from the date of such contract, and to be paid therefor as aforesaid $134 per horse. Petitioner hereby refers to said contracts (copies of which are hereunto attached) for greater certainty, and makes the original part of this petition.

Petitioner further states that immediately after the execution of said several contracts, he proceeded to the Western States for the purpose of complying with and fulfilling said contracts.

Petitioner further states that, on the 5th day of February, 1864, the said cavalry bureau issued to the Government inspectors of horses
2 certain instructions in relation to the inspection of horses to be received in the military service, (a copy of which circular is herewith filed, and the same made part of this petition for greater certainty.)

Petitioner further states that he was ready and willing, and offered to comply with said contract, and deliver the horses specified in such contracts, of the kind and quality therein specified, and in the manner therein specified, at the places specified, but that before such delivery, petitioner was notified by the officers in charge of receiving such horses, that no horses offered for delivery by petitioner would be received under said contracts, except as the same were modified and changed by the instructions so issued as aforesaid and contained in said circular.

Petitioner further states that he made repeated applications, both to the proper officers, at the places of delivery, and also to the proper authorities at Washington, for permission to deliver the horses specified in his said contract upon the terms and conditions therein specified, but was refused; and, on the contrary, it was insisted that petitioner should deliver such horses upon the terms and conditions specified in said circular so issued as aforesaid subsequent to the making of such contracts, the terms of which circular, petitioner was not informed until after he had made extensive arrangements for the fulfillment of such contract.

Petitioner further states that he could and would in all respects have fulfilled the said contracts upon his part, if he had been permitted so to do; but that he was prevented from fulfilling said contracts by the acts of said officers in insisting upon other and different conditions than

those contained in said contracts; and the refusal on their part to receive horses, except upon such amended and new conditions; and for the reason that petitioner would not accede to the terms of such new conditions, imposed without the assent or knowledge of petitioner, he was thrust into prison, and there detained for a period of seventy-five days.

Petitioner further states that he suffered damage by the refusal of the United States to receive such horses, and in the breach of said contracts, the sum of twenty dollars for each and every horse, and in the aggregate $58,000 00, which amount petitioner believing he would have received in profits, if he had been permitted to fulfill his said contracts, which sum he claims in this suit.

Petitioner further states that he is the sole owner of this claim;
3 that he has always been loyal to the Government of the United States, and did not in any way aid or assist the late rebellion against said Government; wherefore he prays judgment.

JOHN SPICER.

A. L. MERRIMAN,
Attorney for Petitioner.

DISTRICT OF COLUMBIA,
County of Washington, ss:

John Spicer, being first duly sworn, deposes and says that no assignment or transfer of said claim, or any part thereof, or interest therein, has been made; that he is justly entitled to the amount in said petition stated, after allowing all just credits and offsets, and that he believing the said petition to be true.

Subscribed and sworn to before me this 8th day of April, 1869.

JOHN F. CALLAN,
Notary Public.

4 *Contract (A.)*

Articles of agreement made and entered into this fourth day of February, anno Domini one thousand eight hundred and sixty-four, between Capt. James A. Ekin, chief quartermaster cavalry bureau, and assistant quartermasier U. S. Army, of the first part, and John Spicer, of Chicago, State of Illinois of the second part.

This agreement witnesseth that the said Capt. James A. Ekin, chief quartermaster cavalry bureau, for and on behalf of the United States of America, and the said John Spicer, for his heirs, executors, and administrators, have covenanted and agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

First. That the said John Spicer shall have delivered at the Government stables in Indianapolis, Indiana, by or before the fifteenth day of March next, the following-named cavalry horses, to wit:

Second. One thousand (1,000) cavalry horses. Said horses to be sound in all particulars; not less than five (5) nor more than nine (9) years of age; from fifteen (15) to sixteen (16) hands high; bridlewise; of size sufficient for cavalry purposes, compactly built, in good flesh, and free from all defects.

Third. It is agreed that deliveries of the above-named horses shall and will be made as follows:

5 One thousand (1,000) within forty (40) days from date of this contract. In case of failure on the part of the party of the second

part to deliver the horses within the time and in the manner specified in this agreement, the party of the first part is authorized to make good the deficiency, by purchase in the open market, at the expense of the said party of the second part.

Fourth. It is agreed that the horses, upon being delivered, shall be examined and inspected, without unnecessary delay, by a person or persons appointed by the United States; and after such inspector shall have certified that they are in all respects as contracted for, and fully equal to the specifications aforesaid, they shall be received, and become the property of the United States; and all such horses as may be condemned and rejected by said inspectors shall be removed from the Government stables within one (1) day after the contractor shall have been notified of said rejection.

Fifth. It is agreed that, for and in consideration of the faithful fulfillment of the above stipulations in all their parts, the party of the first part agrees that the party of the second part shall be paid by the United States, at the Office of Quartermaster U. S. Army, at Washington, D. C., as follows, viz, one hundred and thirty-five dollars (135) for every horse so delivered. Payment to be made on completion of contract, should Congress have made an appropriation for that purpose, or as soon thereafter as funds may be received; withholding ten per cent. from each payment, until the whole quantity shall have been delivered and the contract be completed; and in the event of defalcation or non-fulfillment thereof in any of its parts, on the part of the party of the second part, said ten per cent. shall be, and is hereby, forfeited to the United States.

Sixth. It is further agreed and expressly conditioned, that no member of Congress is, or shall be, admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom; that it is not transferable without the consent of the proper authority; that any sale, transfer, or assignment of it, without such consent having been obtained, (except under process of law,) shall and will be considered an abandonment of it, and the said party of the second part, his or their securities, be held responsible for all loss, delay or damage to the United States which may arise from such abandonment.

6 In witness whereof the parties have hereunto set their hands and seals quintuplicate, in the day and year first above written.

JAMES A. EKIN, [SEAL.]
Chief Q. M. Cav. Bu.
JOHN SPICER. [SEAL.]

Signed and delivered in the presence of—
L. G. HAY.
S. C. DRENNEN.

[Revenue stamp.]

Contract (B.)

Articles of agreement made and entered into this fourth day of February, anno Domini one thousand eight hundred and sixty-four, between Capt. James A. Ekin, chief quartermaster cavalry bureau and assistant quartermaster U. S. Army, of the first part, and John Spicer, of Chicago, State of Illinois, of the second part.

This agreement witnesseth that the said Capt. James A. Ekin, chief quartermaster cavalry bureau, for and on behalf of the United States of

America, and said John Spicer, for his heirs, executors, and administrators, have covenanted and agreed, and by these presents do mutually covenant and agree to and with each other, as follows, viz:

First. That the said John Spicer shall have delivered at the Government stables in Columbus, Ohio, by or before the twenty-
7 fifth day of March next, the following-named cavalry horses, to wit:

Second. Nineteen huedred (1,900) cavalry horses. Said horses to be sound in all particulars; not less than five (5) nor more than nine (9) years of age; from fifteen (15) to sixteen (16) hands high; bridle-wise; of sufficient size for cavalry purposes; compactly built; in good flesh, and free from all defects.

Third. It is agreed that deliveries of the above-named horses shall and will be made as follows:

Nineteen hundred (1,900) within fifty (50) days from date of this contract. In case of failure on the part of the party of the second part to deliver the horses within the time and in the manner specified in this agreement, the party of the first part is authorized to make good the deficiency, by purchase in open market, at the expenses of the said party of the second part.

Fourth. It is agreed that the horses, upon being delivered, shall be examined and inspected, without unnecessary delay, by a person or persons appointed by the United States, and after such inspector shall have certified that they are in all respects as contracted for and fully equal to the specifications aforesaid, they shall be received, and become the property of the United States; and all such horses as may be condemned and rejected by said inspectors shall be removed from the Government stables within one (1) day after the contractor shall have been notified of said rejection.

Fifth. It is agreed that for and in consideration of the faithful fulfillment of the above stipulations in all their parts, the party of the first part agrees that the party of the second part shall be paid by the United States, at the office of Quartermaster U. S. Army, Washington, D. C., as follows, viz., one hundred and thirty-four dollars (134) for each and every horse so delivered, payment to be made on completion of the contract, should Congress have made an appropriation for that purpose, or as soon thereafter as funds may be received, withholding ten per cent. from each payment until the whole quantity shall have been delivered, and the contract be completed; and in the event of defalcation or nonfulfillment thereof in any of its parts on the part of the party of the second part, said ten per cent. shall be, and is hereby, forfeited to the United States.

8 Sixth. It is further agreed and expressly conditioned that no member of Congress is, or shall be, admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom; that it is not transferable without the consent of the proper authority; that any sale, transfer, or assignment of it, without such consent having been obtained, (except under a process of law,) shall and will be considered an abandonment of it, and the said party of the second part, his or their securities, be held responsible for all loss, delay, or damage to the United States, which may arise from such abandonment.

In witness whereof the parties have hereunto set their hands and seals in quintuplicate in the day and year first above written.

JAMES A. EKIN, [SEAL.]
Chief Q. M. Cav. Bu.
JOHN SPICER. [SEAL.]

Sealed and delivered in the presence of—
T. P. BARNES.
S. C. DRENNEN.

[Revenue stamp.]

(C.)

(CIRCULAR.)

WAR DEPARTMENT, CAVALRY BUREAU,
Washington, D. C., Feb. 5, 1864.

Instructions for inspectors of cavalry horses.

Hereafter inspectors of horses, acting under instructions from this bureau will be governed by the following regulations:

9 A register will be kept at each depot on which contractors will register their names, the number of horses they have contracted to deliver, the beginning and end of each contract, and the number presented for inspection each day.

Inspections will be made according to this register. Any contractor not present when his turn comes, will be required to wait till the horses of those who shall then be waiting shall be inspected. The senior inspector will cause the horses furnished under each contract to be placed in the inspection yard, at least twenty-four hours before inspecting them; at which time he will require every person except his assistants to leave the yard, and permit no other person to enter it, or handle the horses, until the inspection and branding is completed.

2. The inspection will be conducted with the view of obtaining sound and serviceable horses, and in such a way as to make it to the advantage of the contractor to identify his interest with those of the Government. Therefore, all horses presented that are manifestly an attempt at fraud on the Government, because of incurable disease, or any purposely concealed defect whatever, shall be branded on the left shoulder with the letter R.

3. Horses that are rejected for being under age, in poor condition, or temporarily injured by transportation or otherwise, shall be lightly branded on the front part of the forehoof, near the coronet, with the letter R, not to exceed in length three-fourths of an inch. Should any horse thus marked become fit for service before the expiration of one month, he may be again presented for inspection, provided the contractor, before presenting him, shall notify the inspector or inspectors of the fact. Inspectors will be particularly careful in making these re-inspections, and any horse once rejected, that is presented without the required warning, shall be considered as an attempt at fraud upon the Government and be treated as prescribed in paragraph 2.

4. All horses rejected will be removed as soon as they pass from the hands of the inspectors, from the immediate vicinity of the corrals in which those accepted are kept.

5. When horses are doubtful, before branding, they may be kept three or four days, under guard, at the expense of the contractor, be again rigidly examined, and then finally disposed of in accordance with the foregoing rules. No mares will be accepted.

6. In the inspection of horses, inspectors will proceed as follows: The horses will be led one by one as fast as needed, from the *the* receiving yard, by a halter or snaffle-bridle, without blinds or saddle; then ascertain his height by actual measurement. He should be between fifteen (15) hands and sixteen (16) hands high. Examine his mouth and ascertain his age, and that his teeth are sound. When the teeth have been filed or otherwise tampered with, to conceal his age, he shall be treated as an attempt at fraud. No horse under size, or less than five (5) years of age, or over nine (9) should be received, except when he is in every other way suitable for cavalry service. In no case will horses over ten years of age be received. Look at his eyes and see that they are sound. Examine his ears, and see that they are clear of disease; particularly on the inside. Examine his head carefully in other respects, and see that there are no diseases or material imperfections. Inspect his legs closely for spavins, splints, sprains, curbs, and other imperfections.

7. Each foot should be carefully examined, to see that there are no cracked, split, or pummiced hoofs, corns, or evidences of acute founder. The feet should be sound in all respects. Next examine the general appearance of the horse; that his coat is sound and good, withers not too high nor too heavy; that the length of the loins is in proportion to the rest of the body; the back sound and free from knots, and old sores, temporarily healed; the belly large and not pinched up. After having gone through the foregoing, the horse should be led off, first at a walk then at a trot. Observe how he moves, that his feet do not interfere, and that his motion is free from stiffness. He should be turned short around to the right and left, to ascertain any injury to the chest or shoulders. He should then be mounted, and vigorously exercised for several minutes, to see that his wind is good; that he has strength to carry his rider; does not stumble, and has been properly broken.

8. These means having been resorted to, and no serious defect discovered, the horse must be returned to the stand of the inspector, and, under his observation, branded on the left fore shoulder with U. S., in the usual manner. The initials of the name of the inspector, together with that of the contractor, shall also be branded on the neck, under the mane in such a manner that each horse can be traced to the
11 inspector and contractor by whom he was brought into service. This brand should not be too large, should be placed on the flat of the neck, the inspector's name first, and then that of the contractor.

9. All branding irons, when not in use, must be kept under lock and key, in charge of the quartermaster receiving the animals. Every precaution must be taken to prevent rejected horses from being put among good ones, and branded as passed. Gates of corrals should be secured at night by locks, and military guards, when practicable, be stationed so as to prevent tampering in any way with the enclosure or the horses.

10. Horses will be fed at the expense of contractors, till they have been branded and accepted.

11. A complete record of all inspections will be kept at the office of each receiving quartermaster on duty at that post. A copy of this record will be forwarded at the close of each contract, and give detailed information concerning the entire range of duties involved in the purchase, care, and inspection of horses for cavalry service, at that place.

12. The following certificates will be made on the inspection report of the inspector, when he is a commissioned officer. The affidavit attached is for civil inspectors, and must be qualified in the manner pre-

scribed by the present regulations and orders of the Army. (Reg. 1031.) It should be, for convenience, printed upon the voucher.

(Certificate omitted.)

By order of the Secretary of War.

J. H. WILSON,
Brigadier General in charge of Bureau.

12 United States Court of Claims. December term, 1868.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936.

Plea of former suit in bar.

And the said defendants, by their Attorney General, come and say that the said plaintiff ought not further to maintain his action aforesaid against the said defendant, for that heretofore, at the October term of this court, 1865, the said plaintiff filed his petition claiming to recover of said defendants for the same identical cause of action specified and counted upon in the petition filed in this cause; and such proceedings were thereupon had that said cause was duly tried at said term of said court, and said court did thereupon decide and adjudge that said plaintiff take nothing by his said suit, and that his said petition be dismissed.

E. R. HOAR,
Attorney General.

Filed July 6, 1869.

13 In the Court of Claims.

JOHN SPICER
vs.
THE UNITED STATES. } 5936.

And the said claimant, by leave of the court, comes and craves oyer of the record set forth in the plea of the said defendants and the same being read to the court, the claimant says that the said plea of said defendants, and the matters therein contained is & are insufficient in law to bar the claimant's action in this court.

A. L. MERRIMAN,
Att'y for Cl'm't.

Filed 8th Oct., 1869.

14 In the United States Court of Claims.

The next following is a true copy of the record of the pleadings and final judgment of the court in the case of John Spicer vs. The United States, No. 2146, of which oyer is prayed in this record.

15 In the Court of Claims.

JOHN SPICER
vs.
THE UNITED STATES. } 2146. Filed January 9, 1865.

To the hon. the judges of the Court of Claims:

The petition of John Spicer, a citizen of Illinois and resident of

Chicago, respectfully represents: That, on the 4th day of February, 1864, at Washington City, he entered into a special contract with Captain James A. Ekin, chief quartermaster of the cavalry bureau, duly authorized and acting for the United States, whereby your petitioner agreed to deliver at the Government stables in Indianapolis, Indiana, by or before the 15th day of March then next, one thousand cavalry horses of the kind described in said contract. And on said 4th day of February, 1864, your petitioner entered into another special contract with the said Captain James A. Ekin, duly authorized and acting for the United States, whereby your petitioner agreed to deliver at the Government stables in Columbus, Ohio, by or before the 25th day of March then next, nineteeen hundred cavalry horses of the kind described in said contract. And the United States agreed, that the horses upon being delivered should be examined and inspected without unnecessary delay by a person or persons appointed by the United States, and that for each horse so delivered and accepted at Indianapolis, the United States should pay one hundred and thirty-five dollars, and for each horse so delivered and accepted at Columbus, Ohio, one hundred and thirty-four dollars. And your petitioner gave bond with approved sureties in a large amount conditioned for the faithful performance of said contracts, copies of which contracts are hereto annexed marked exhibits A and B.

And your petitioner further shows that, according to the custom and usage of the trade in horses, those persons who, like your petitioner, undertake to supply to the Government large numbers of horses in very brief period, are not themselves raisers or owners of such stock, except to a limited extent, but are men who, by their business connections, their knowledge of the country, their acquaintance with the sources of supply, and their command of capital, are able to purchase from numerous individuals small lots of horses to make up the aggregate required; and it is the custom and usage of the trade, that the individual owner sells his horses to the contractor, subject to Government inspection, and presents them to the Government officers for inspection on the contractor's account, and for all horses accepted on said inspection, the contractor pays the owner in cash on the spot, and the contractor takes the risk of delay of payment from want of appropriations or prompt remittances, and of the forfeitures exacted if the contract be not fulfilled,
16 and the depreciation of the certificates in which a portion of the price is always paid; all which responsibilities, risks, and contingencies and possible delays, the owners of small numbers of horses are unwilling to incur.

And your petition' further shows that within a few hours after the execution of the said contracts, that is, on the afternoon of said 4th day of February, your petitioner left Washington and proceeded to the Northwest in order to collect and secure the large number of horses which he had engaged to deliver, but while at Chicago, on or about the 10th of February, he heard it reported that a regulation had been issued by the chief of the cavalry bureau at Washington, for the government of inspectors appointed to inspect horses delivered by contractors, whereby those inspectors were instructed to retain in the Government inspection-yard all horses offered by the contractors for the space of twenty-four hours before inspection, and if the horses were doubtful, to retain them from one to four days after inspection; and in the meantime to permit no person, other than the Government employees to have any access to them; and to charge the contractors with the cost of keeping said horses during the time of their detention; and the inspectors were authorized before

returning to the contractors such horses as should be rejected, to brand upon the shoulder of any such horse a conspicuous and indelible mark, signifying that the animal had an incurable disease, or some concealed defect, and that the contractor or owner had fraudulently endeavored to impose him upon the Government; and to brand upon the hoof another mark signifying that the animal was under age, or in poor condition, or temporarily injured. Your petitioner then repaired to Columbus, Ohio, and at that place, on or about the 15th day of February, 1864, he was informed by Captain Fielding Lowry, quartermaster of the cavalry bureau, the officer charged with the duty of receiving horses delivered by contractors at that place, that instructions of the tenor above set forth had been issued by the cavalry bureau at Washington under date of February 5th, 1864, and that no horses would be received from your petitioner unless he would deliver the horses subject to said regulation.

And your petitioner further shows that the conditions imposed by this regulation and enforced by the officers charged with the duty of receiving horses purchased by the cavalry bureau at Columbus, Ohio, and Indianapolis, Indiana, were contrary to the custom and usage of the trade in horses, and contrary to the practice and usage of the Government in purchasing horses, and were not warranted by the terms, expressed or implied, of the contracts above mentioned, and would, if acceded to, have involved your petitioner in ruinous losses. Wherefore your petitioner refused to accede to said conditions, and the United States officers notified him that no horses would be received from him unless he would submit to said conditions.

And your petitioner further shows that, even if he had been willing
17 to deliver the comparatively small number of horses which he then had, subject to the regulation aforesaid, he found, on conferring with the owners of horses, that it was utterly impracticable to induce them to deliver horses on those conditions, and thereby incur the risk of having their horses injured by neglect or accident in the public inspection-yard, and the further risk of having them disfigured and their value depreciated by the branding aforesaid.

And your petitioner further shows that he was able and ready and willing to deliver the horses required by the said contracts, according to the true intent and meaning thereof, and offered so to do, and that he was prevented from performing said contracts by the refusal of the authorized officers of the Government to examine and inspect the horses according to the terms and requirements of said contracts, as hereinbefore stated.

And your petitioner further shows that he made repeated applications to the proper officers to revoke the instructions hereinbefore stated, and to consent to have your petitioner's horses examined and inspected according to the custom, usage, and practice of the trade, and according to the true intent and meaning of the contracts, but without effect.

And your petitioner further shows that, having consumed almost the entire time allotted for the performance of the contracts in fruitless efforts to induce the officers of the Government to revoke the instructions hereinbefore mentioned, and in fruitless endeavors to procure the required numbers of horses to be delivered under those instructions, your petitioner repaired to Washington and reported at the cavalry bureau, on the 26th day of March, 1864, the day after the expiration of the period allotted for delivering horses, and then and there explained to the officer in charge thereof, General Wilson, how the instructions hereinbefore mentioned had prevented the performance of the said con-

tracts; and General Wilson appeared to be satisfied with the explanation; nevertheless, within an hour after leaving the bureau, your petitioner was arrested by the military authorities upon the request, as he is informed and believes, of the said General Wilson, and was closely confined in the old capitol military prison, where he was detained for the space of seventy-eight days. And during the first ten days of the time he was not permitted to have any communication with persons outside the prison, but with the superintendent thereof only. And after some time spent in prison, your petitioner was brought to trial before a military commission on a charge of having wilfully neglected to fulfil' his said contracts, but he was released from prison on the 12th day of June last.

And your petitioner further shows that, at the time he was arrested, as hereinbefore stated, he had on hand about 160 horses at a daily expense of 160 dollars, and he had about 14,000 dollars due him for horses sold and delivered to a dealer, and he had obligations in bank falling due to the amount of from 75,000 to 100,000 dollars; and, by being suddenly taken from his business and prevented from giving any directions respecting these heavy and important interests, he was subject to great distress and anxiety of mind; and for want of care and attention and proper management, he lost upon the horses which he had on hand when imprisoned, not less then fifteen thousand dollars; and he also lost the debt of fourteen thousand dollars, which he would have secured had he been at liberty, and in credit and reputation, he sustained damage to a very large amount.

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And your petitioner further shows that, in his efforts to furnish the horses required by the contracts hereinbefore set forth, he incurred all the expense and expended all the time and labor that would have been necessary to have performed his said contracts, had the United States performed the covenants on their side to be performed; and that by the failure and refusal of the United States to perform their covenants for the examination and inspection of the horses to be delivered by your petitioner, and by the breach of contract on their part in refusing to provide for the examination and inspection of the horses to be delivered by your petitioner otherwise than on condition that he would deliver horses subject to the regulation hereinbefore stated, your petitioner has sustained damage to the amount of forty thousand dollars, and he claims that sum in this suit.

And your petitioner further shows that he has always borne true allegiance to the Government of the United States, and has not, in any way, aided, abetted, or given encouragement to rebellion against the said Government.

JOHN SPICER.

[Stamp.]

DISTRICT OF COLUMBIA,
County of Washington:

On this 22nd day of December, 1864, before me, Edgar H. Bates, a justice of the peace in and for the county aforesaid, personally appeared John Spicer, and made oath on the Holy Evangely of Almighty God, that no assignment or transfer of the claim in the foregoing petition stated has been made, or of any part thereof or interest therein, and that he is justly entitled to the amount therein stated, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

EDGAR H. BATES, *J. P.* [SEAL.]

Address:
JOHN SPICER, *Claimant*,
JOHN M. MCCALLA, *Attorney*,
CARLISLE & MCPHERSON, *Counsel*,
Washington City, D. C.

19 *Contract (A.)*

Articles of agreement made and entered into this fourth day of February, anno Domini one thousand eight hundred and and sixty-four, between Capt. James A. Ekin, chief quartermaster cavalry bureau and assistant quartermaster U. S. Army, of the first part, and John Spicer, of Chicago, State of Illinois, of the second part.

This agreement witnesseth that the said Capt. James A. Ekin, chief quartermaster cavalry bureau, for and on behalf of the United States of America, and the said John Spicer, for his heirs, executors, and administrators, have covenanted and agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

First. That the said John Spicer shall have delivered at the Government stables in Indianapolis, Indiana, by or before the fifteenth day of March next, the following named cavalry horses, to wit:

Second. One thousand (1,000) cavalry horses. Said horses to be sound in all particulars; not less than five (5) nor more than nine (9) years of age; from fifteen (15) to sixteen (16) hands high; bridlewise; of size sufficient for cavalry purposes, compactly built; in good flesh, and free from all defects.

Third. It is agreed that deliveries of the above-named horses shall and will be made as follows:

One thousand (1,000) within forty (40) days from date of this contract. In case of failure on the part of the party of the second part to deliver the horses within the time and in the manner specified in this agreement, the party of the first part is authorized to make good the deficiency, by purchase in the open market, at the expense of the said party of the second part.

Fourth. It is agreed that the horses upon being delivered, shall be examined and inspected without unnecessary delay, by a person or persons appointed by the United States, and after such inspector shall have certified that they are in all respects as contracted for and fully equal to the specifications aforesaid, they shall be received and become the property of the United States; and all such horses as may be condemned and rejected by said inspectors shall be removed from the Government stables within one (1) day after the contractor shall have been notified of said rejection.

Fifth. It is agreed that for and in consideration of the faithful fulfillment of the above stipulations in all their parts, the party of the first part agrees that the party of the second part shall be paid by the United States, at the office of Quartermaster U. S. Army, at Washington, D. C., as follows, viz, one hundred and thirty-five dollars for each and every horse so delivered, (135.) Payment to be made on completion of contract, should Congress have made an appropriation for that purpose, or as soon thereafter as funds may be received; withholding ten per cent. from each payment until the whole quantity shall have been delivered, and the contract be completed; and in the event of defalcation or non-fulfilment thereof in any of its parts, on the part of the party of

the second part, said ten per cent. shall be, and is hereby, forfeited to the United States.

Sixth. It is further agreed and expressly conditioned that no member of Congress is, or shall be, admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom; that it is
20 not transferable without the consent of the proper authority; that any sale, transfer, or assignment of it, without such consent having been obtained, (except under a process of law,) shall and will be considered an abandonment of it, and the said party of the second part, his or their securities, be held responsible for all loss, delay, or damage to the United States, which may arise from such abandonment.

In witness whereof the parties have hereunto set their hands and seals, quintuplicate, in the day and year first above written.

JAMES A. EKIN, [SEAL.]
Chief Q. M. Cav. Bu.
JOHN SPICER. [SEAL.]

Signed and delivered in the presence of—
L. G. HAY,
S. C. DRENNEN.

[Revenue stamp.]

Contract (B.)

Articles of agreement, made and entered into this fourth day of February, anno Domini one thousand eight hundred and sixty-four between Capt. James A. Ekin, chief quartermaster cavalry bureau and assistant quartermaster U. S. Army, of the first part, and John Spicer, of Chicago, State of Illinois, of the second part.

This agreement witnesseth that the said Capt. James A. Ekin, chief quartermaster cavalry bureau, for and on behalf of the United States of America, and the said John Spicer, for his heirs, executors, and administrators, have covenated and agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

First. That the said John Spicer shall have delivered at the Government stables in Columbus, Ohio, by or before the twenty-fifth day of March next, the following named cavalry horses, to wit:

Second. Nineteen hundred (1,900) cavalry horses. Said horses to be sound in all particulars; not less than five (5) nor more than nine (9) years of age; from fifteen (15) to sixteen (16) hands high; bridlewise; of size sufficient for cavalry purposes, compactly built; in good flesh, and free from all defects.

Third. It is agreed that deliveries of the above-named horses shall and will be made as follows:

Nineteen hundred (1900) within fifty (50) days from date of this contract. In case of failure on the part of the party of the second part to deliver the horses within the time and in the manner specified in this agreement, the party of the first part is authorized to make
21 good the deficiency, by purchase in the open market, at the expenses of the said party of the second part.

Fourth. It is agreed that the horses, upon being delivered, shall be examined and inspected without unnecessary delay by a person or persons appointed by the United States, and after such inspector shall

have certified that they are in all respects as contracted for and fully equal *lo* the specifications aforesaid, they shall be received and become the property of the United States; and all such horses as may be condemned and rejected by said inspectors shall be removed from the Government stables within one (1) day after the contractor shall have been notified of said rejection.

Fifth. It is agreed that, for and in consideration of the faithful fulfillment of the above stipulations in all their parts, the party of the first part agrees that the party of the second part shall be paid by the United States, at the office of Quartermaster U. S. Army, at Washington, D. C., as follows, viz, one hundred and thirty-four dollars for each and every horse so delivered, (134.) Payment to be made on completion of contract should Congress have made an appropriation for that purpose, or as soon thereafter as funds may be received, withholding ten per cent. from each payment until the whole quantity shall have been delivered and the contract be completed; and in the event of defalcation or non-fulfillment thereof in any of its parts, on the part of the party of the second part, said ten per cent. shall be and is hereby forfeited to the United States.

Sixth. It is further agreed and expressly conditioned, that no member of Congress is, or shall be, admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom; that it is not transferable without the consent of the proper authority; *i*hat any sale, transfer, or assignment of it, without such consent having been obtained, (except under a process of law,) shall and will be co*d*sidered an abandonment of it, and the said party of the second part, his or their securities, be held responsible for all loss, delay, or damage to the United States which may arise from such abandonment.

In witness whereof the parties have hereunto set their hands and seals, quintipulate, in the day and year first above written.

JAMES A. EKIN, [SEAL.]
Chief Q. M. Cav. Bu,
JOHN SPICER, [SEAL.]

Sealed and delivered in the presence of—
T. P. BARNES.
S. C. DRENNEN.

[Revenue stamp.]

22 In the U. S. Court of Claims. October term, 1865.

JOHN SPICER
vs.
THE UNITED STATES. } No. 2146. Filed Sept. 5, 1865.

The United States, by their solicitor, come and say that the said claimant's petition, and the matters and things therein stated and set forth, are not sufficient in law for the said claimant to have or maintain his aforesaid action. Wherefore the United States pray judgment if they shall make any other or further answer to the matters and things set forth in claimant's petition, &c.

JOHN J. WEED,
Assistant Solicitor for the United States.

And the United States point out and show to the court specially the following causes of demurrer:

1st. That the petition shows that the claimant entered into two special contracts with Col. James A. Ekin, an agent of the United States, by which said claimant undertook and contracted to furnish, for the use of the Army of the United States, two thousand horses, to be delivered at a certain time and place, and for a certain sum therein specified; and that the claimant never delivered or offered to deliver any portion of the horses which he so contracted to furnish to the United States.

2d. It is not shown or alleged in said petition that the United States ever, at any time, neglected or refused to receive or inspect any horses which the claimant offered under his said contract.

3d. That the regulation or order issued from the chief of the cavalry bureau to the inspectors of horses offered for sale to the Government, did not require the claimant to furnish horses of any other or different quality than those specified in the invitation for proposals under which the claimant became a bidder as well as in the contract which the claimant executed.

4th. That the regulations issued from the cavalry bureau to inspectors of horses, which the claimant avers prevented the fulfillment of his contract, were not issued for the purpose of requiring the claimant to furnish horses different from those specified in his contract.

23 5th. The petition shows that the claimant was to complete the delivery of the horses which he had contracted to deliver under his contracts on the 15th and 25th days of March, 1864, respectively; but that, up to that time, he had neither delivered nor offered to deliver to the Government inspector any portion of the horses he had contracted to furnish; and that, by reason of such failure to fulfill his said contract, the claimant was arrested and confined in the Old Capitol prison. But the petition neither avers nor shows that the claimant was not rightfully arrested for neglect of duty as a Government contractor.

6th. Even if the arrest of the claimant and his detention in the Old Capitol prison were wrongful and unauthorized, this court has no jurisdiction to afford the claimant any relief. His only remedy is against the officer who caused his wrongful arrest and detention.

7th. That said petition is in other respects insufficient, uncertain, and informal.

JOHN J. WEED,
Assistant Solicitor for the United States.

24 In the Court of Claims.

JOHN SPICER
vs. } 2146.
THE UNITED STATES.

And now, to wit, 14th of February, A. D. 1866, the court, upon due consideration of the premises, do sustain the demurrer, and do order, adjudge, and decree that the said petition be dismissed.

By the court.

25 In the United States Court of Claims.

JOHN SPICER
vs. } 5936.
THE UNITED STATES.

Nott, J., delivered the opinion of the court in this case as submitted, 7th December, 1869, to wit:

The demurrer in this case is sustained, the special plea in bar is overruled, and the defendants will answer over.

By the court.

FEBRUARY 28, 1870.

26 In the Court of Claims of the United States.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936. Filed Jan'y 20, 1870.

Special plea for defendants.

And the said defendants, by their Attorney General, now come, and, by leave of court, (as expressed in Rule IX,) say that the said claimant ought not further to maintain said action, because—

1. While the claim presented in this petition is such as is ordinarily settled in an Executive Department, the petition does not set forth the decision thereon of the proper Department of the Government to which application was (as is alleged) made for the payment of the claim. (Rule II.)

2. The petition does not set forth a full statement of the action, on the claim therein presented, by a Department of the Governnment, as required by section 1 of the act of February 4, 1855.

3. The evidence in the case does not show that any such application has ever been made to any Department of the Government, whether with or without success, or any action whatever thereon, without which action this court has no lawful jurisdiction in this case.

And the said defendants pray judgment, &c.

THOMAS H. TALBOT,
Assistant Attorney General.

27 U. S. Court of Claims. December term, 1869.

Amended petition.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936. Allowed and filed March 2, 1870.

Now comes your petitioner, John Spicer, and prays that as an amendment to his petition heretofore filed in this cause, and in addition and not in lieu of the cause of action therein stated, to represent:

That, soon after he had entered into the contracts set forth in said original petition and before he had offered to deliver any horses and before he was required to do so by the terms of said contract, viz, on the 1st March. A. D. 1864, he was notified by the officers of the Quartermaster's Department, representing the defendant in that behalf, that no horses would be received under his said contract and the terms thereof. That this was done against the objection of the petitioner and without his consent, and that petitioner was ready and willing and offered to perform the said contract on his part and was prevented from doing so by the refusal of the defendant to permit such performance.

Whereby your petitioner became entitled to recover from the defendant the difference between the reasonable market value of the said horses at the time and places agreed upon for their delivery, and the prices

agreed to be paid for the same by the United States, amounting to the sum of fifty-eight thousand dollars.

Whereof he prays judgment for the said sum of fifty-eight thousand dollars and for such other relief as the nature of the case may show he is entitled to.

JOHN SPICER.

28 DISTRICT OF COLUMBIA,
County of Washington, ss:

John Spicer, being duly sworn, deposeth that he is the claimant in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition is stated; that claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

JOHN SPICER.

Sworn and subscribed to before me, a clerk in and for said Court of Claims.

Witness my hand and official seal this 1st day of March, A. D. 1870.

[SEAL.] JOHN RANDOLPH.

Claimant's address is—

Claimant's solicitors—

HUGHES, A. L. MERRIMAN & PECK,
Washington, District of Columbia.

29 In the United States Court of Claims. December term, A. D. 1869.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936. Filed March 1, 1870.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of fifty-eight thousand dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOM'S H. TALBOT,
Assistant Attorney General.

30 In the Court of Claims.

JOHN SPICER
vs.
THE UNITED STATES. } 5936.

At a Court of Claims held at the Capitol in the city of Washington,

thirteenth of March, A. D. 1871, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said John Spicer, claimant, have and recover of and from the United States the sum of thirty-nine thousand nine hundred dollars no cents, (39,900 00.)

By the court.

A true copy of record.

31 In the United States Court of Claims.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936.

The defendants, by their Attorney General, come and take an appeal from the judgment of the Court of Claims rendered herein on the 6th day of March, 1871, to the Supreme Court of the United States.

THO'S H. TALBOT,
Ass't Att'y Gen'l.

Filed in clerk's office May 1, 1871.

JOHN SPICER
vs.
THE UNITED STATES. } 5936.

Ordered that the appeal be allowed as prayed for.

By the court.

MAY 1, 1871.

32 Court of Claims.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936.

In pursuance of the rule of the Supreme Court, this court finds the facts in this case to be as follows:

1. On the fourth day of February, 1864, the claimant entered into a contract in writing with Captain James A. Ekin, chief quartermaster cavalry bureau and assistant quartermaster U. S. A., for the delivery at the Government stables in Indianapolis, Indiana, of one thousand cavalry horses, being the contract declared upon in the petition and annexed thereto as a part thereof, as Exhibit A.

2. On the said fourth day of February, 1864, the claimant entered into another contract with the same officer, for the delivery at the Government stables in Columbus, Ohio, of nineteen hundred cavalry horses, being the contract declared upon in the petition and annexed thereto as a part thereof as Exhibit B.

3. On the fifth day of February, 1864, the War Department is-
33 sued a circular letter of instructions for inspectors of cavalry horses, in the words and figures following, to wit:

"CIRCULAR.

"WAR DEPARTMENT, CAVALRY BUREAU,
"*Washington, D. C., Feb.* 5, 1864.

"*Instructions for inspectors of cavalry horses.*

"Hereafter inspectors of horses, acting under instructions from this bureau, will be governed by the following regulations:

"A register will be kept at each depot on which contractors will register their names, the number of horses they have contracted to deliver, the beginning and end of each contract, and the number presented for inspection each day.

"Inspections will be made according to this register. Any contractor not present when his turn comes, will be required to wait till the horses of those who shall then be waiting shall be inspected. The senior inspector will cause the horses furnished under each contract to be placed in the inspection-yard, at least twenty-four hours before inspecting them; at which time he will require every person except his assistants to leave the yard, and permit no other person to enter it, or handle the horses, until the inspection and branding is completed.

"2. The inspection will be conducted with the view of obtaining sound and serviceable horses, and in such a way as to make it to the advantage of the contractor to identify his interest with those of the Government. Therefore, all horses presented that are manifestly an attempt at fraud on the Government, because of incurable disease, or any purposely concealed defect whatever, shall be branded on the left shoulder with the letter R.

"3. Horses that are rejected for being under age, in poor condition, or temporarily injured by transportation or otherwise, shall be lightly branded on the front part of the fore-hoof near the coronet, with the letter R, not to exceed in length three-fourths of an inch. Should any horse thus marked become fit for service before the expiration of one month, he may be again presented for inspection, provided the contractor, before presenting him, shall notify the inspector or inspectors of the fact. Inspectors will be particularly careful in making these re-inspections, and any horse once rejected, that is presented without the required warning, shall be considered as an attempt at fraud upon the Government and be treated as prescribed in paragraph 2.

"4. All horses rejected will be removed as soon as they pass from the hands of the inspectors, from the immediate vicinity of the corrals in which those accepted are kept.

"5. When horses are doubtful, before branding, they may be kept three or four days, under guard, at the expense of the contractor, be again rigidly examined, and then finally disposed of in accordance with the foregoing rules. No mares will be accepted.

"6. In the inspection of horses, inspectors will proceed as follows: The horses will be led one by one as fast as needed, from the *the* receiving yard, by a halter or snaffle-bridle, without blinds or saddle; then ascertain his height by actual measurement. He should be between fifteen (15) hands and (16) hands high. Examine his mouth and ascertain his age, and that his teeth are sound. When the teeth have been filed or otherwise tampered with, to conceal his age, he shall be treated as an attempt at fraud. No horse under size, or less than five (5) years of age, or over nine (9) should be received, except when he is in every

other way suitable for cavalry service. In no case will horses over ten years of age be received. Look at his eyes, and see that they are sound. Examine his ears, and see that they are clear of disease; particularly on the inside. Examine his head carefully in other respects, and see that there are no diseases or material imperfections. Inspect his legs closely for spavins, splints, sprains, curbs, and other imperfections.

"7. Each foot should be carefully examined, to see that there are no cracked, split, or pummiced hoofs, corns, or evidences of acute founder. The feet should be sound in all respects. Next examine the general appearance of the horse; that his coat is sound and good, withers not too high nor too heavy; that the length of the loins is in proportion to the rest of the body; the back sound and free from knots, and old sores, temporarily healed; the belly large and not pinched up. After having gone through the foregoing, the horse should be led off, first at a walk then at a trot. Observe how he moves, that his feet do not interfere, and that his motion is free from stiffness. He should be turned short around to the right and left, to ascertain any injury to the chest or shoulders. He should then to be mounted, and vigorously exercised for several minutes, to see that his wind is good; that he has strength to carry his rider; does not stumble, and has been properly broken.

"8. These means having been resorted to, and no serious defect discovered, the horse must be returned to the stand of the inspector, and under his observation, branded on the left fore shoulder with U. S., in the usual manner. The initials of the name of the inspector, together with that of the contractor, shall also be branded on the neck, under the mane in such a manner that each horse can be traced to the inspector and contractor by whom he was brought into service. This brand should not be too large, should be placed on the flat of the neck, the inspector's name first, and then that of the contractor.

"9. All branding irons, when not in use, must he kept under lock and key, in charge of the quartermaster receiving the animals. Every precaution must be taken to prevent rejected horses from being put among good ones, and branded as passed. Gates of corrals should be secured at night by locks; and military guards, when practicable, be stationed so as to prevent tampering in any way with the enclosure or the horses.

"10. Horses will be fed at the expense of contractors till they have been branded and accepted.

"11. A complete record of all inspections will be kept at the office of each receiving quartermaster on duty at that post. A copy of this record will be forwarded at the close of each contract, and give detailed information concerning the entire range of duties involved in the purchase, care, and inspection of horses for cavalry service at that place.

"12. The following certificates will be made on the inspection report of the inspector, when he is a commissioned officer. The affidavit attached is for civil inspectors, and must be qualified in the manner prescribed by the present regulations and orders of the Army. (Reg. 1031.) It should be, for convenience, printed upon the voucher.

("Certificates omitted.)

"By order of the Secretary of War.

"J. H. WILSON,

"*Brigadier General in charge of Bureau.*"

34 4. The claimant was able, and expressed himself to Brigadier General J. H. Wilson as willing, to fulfill his contracts according

to their terms, and requested the said Wilson to modify the said order of February 5, 1864, and allow horses to be presented for inspection in the manner which had been practiced previous to the issuing of said order; but the said Wilson refused to modify said order, and the claimant did not present any horses for inspection thereunder.

5. The said circular letter of instructions prescribed regulations in regard to inspections different from the previous practice of the Government officers in such cases in the following particulars, to wit: In requiring horses presented for inspection to be placed in the inspection-yard at least twenty-four hours before inspecting them; in requiring every person, except the inspecting officer and his assistants, to leave the inspection-yard during the inspection and branding of the horses; in requiring all horses that were manifestly an attempt at fraud on the Government, because of incurable disease, or any purposely-concealed defect whatever, to be branded on the left shoulder with the letter R; in requiring horses that were rejected for being under age, in poor condition, or temporarily injured by transportation or otherwise, to
35 be branded with the letter R on the front part of the fore-hoof; and in authorizing horses which were doubtful, before branding, to be kept three or four days, under guard, at the expense of the contractor, and then rigidly examined, and finally disposed of in accordance with the rules prescribed in said instructions.

6. Before the issue of said instructions there was no difficulty in contractors with the Government for supplying horses obtaining a sufficient number of them to fulfill their contracts, subject to the Government inspection; but, after that time, owners of horses almost wholly refused to bring them for inspection, or to sell them subject to inspection, because of the terms of said instructions.

7. The refusal of owners of horses to sell them to contractors subject to the acceptance of the Government officers under said instructions, made it impracticable for the claimant to have fulfilled his contracts within the times therein prescribed; for, in order thereto, it was under said instructions necessary for him personally to make examination of each horse, which would have been impossible within the times limited by the contracts.

8. The said instructions, in requiring horses presented by contractors to be put out of their possession, and placed in the inspection-yard at least twenty-four hours before inspecting them, made the horses liable to injury from kicks and bruises, and to contract contagious diseases.

36 9. The market value of horses at Columbus, Ohio, during the period in which the claimant was required, by the said contract, marked B, to deliver them, was one hundred and twenty dollars, if bought subject to such inspection as existed and was practiced by Government officers prior to the issue of said instructions.

10. The market value of horses at Indianapolis, Indiana, during the period in which the claimant was required, by the said contract, marked A, to deliver them, was one hundred and thirteen dollars, if bought subject to such inspection as existed and was practiced by the Government officers prior to the issue of said instructions.

Upon the foregoing facts, the court announces the following conclusions of law:

1. That the circular letter of instructions above set forth, made new contracts, different from those into which the claimant had entered with the Government.

2. That the officer issuing said letter had no legal authority so to change the terms of the said contracts.

3. That the claimant was not, in law, bound to attempt to fulfill said contracts, after the issue of said instructions, and the refusal of General Wilson to modify the same.

37 4. That the claimant is entitled to recover from the United States such amount as would put him as nearly as possible in the same situation as he would have been in if he had been allowed to deliver the horses in accordance with the terms of his contracts.

5. That the claimant is entitled to recover damages to the amount of thirty-nine thousand nine hundred dollars; for which amount judgment is ordered.

By the court.

38 Court of Claims.

JOHN SPICER *vs.* THE UNITED STATES. } No. 5936.

The following request for findings for claimant was refused by the court:

1. The claimant, on the 4th day of February, 1864, entered into the two contracts with the defendant referred to, and attached to the petition in this case.

2. The defendant, by its officer, the chief of the cavalry bureau, shortly afterwards issued the circular referred to, and attached to said petition, marked Exhibit "C."

3. At the time those contracts were entered into, and long prior thereto, the mode of inspection for horses purchased by the Government had been for the horses to be presented and immediately examined in the presence of the owner; and if satisfactory, they were accepted, and if unsatisfactory, they were immediately returned to the contractor, without delay, expense, or blemish.

39 4. At the time the contracts were entered into, and for a long time prior thereto, the usual course of business, in filling contracts of this kind, had been for the contractor to buy his horses subject to the Government inspection. One effect of the order for a new mode of inspection was to create a change in this course of business, and thereafter no horses could be purchased by contractors subject to this new inspection. Another effect of this order was to impose upon the contractor considerable risk while the horses were in the custody of the inspector, being injured by kicks and bruises, and incurring contagious diseases; and the identity of the animals being lost, by being mingled with other lots, so that in the event of rejection, the same animals could not be returned, besides the expense of keeping the animals, and the injury which might accrue from the rejecting brand. The effect of branding a rejected horse, as prescribed by the new order of inspection, would be to greatly lessen the market value.

5. The claimant, during the existence of the contracts, was possessed of sufficient means and credit to comply with the stipulations on his part, and, by his agents, proceeded to the points named in the con-

40 tracts respectively, and made all necessary arrangements for the fulfilling of said contracts. That, after ascertaining from the officers in charge of the Government stables at Indianapolis and Columbus, that they would not receive horses upon said contracts, except as

modified or changed by said circular, claimant went to Chicago, where Gen. Wilson, chief of the cavalry bureau, was, endeavored to procure a modification of said order of inspection, and repeatedly offered to said Wilson and to the officers in charge of the Government stables at Indianapolis & Columbus, to go on and fill the contracts, in the manner prescribed in the contracts, which offer was uniformly refused; and the said chief of the said cavalry bureau not only refused to modify the said order of inspection; but he and all the officers having control in the matter refused to receive any horses from claimant, except under the mode of inspection provided in said circular; and, in consequence of such refusal to receive horses, except under said conditions, claimant did not present any horses to the inspectors.

6. The fair and reasonable profits which would have accrued to claimant, if he has been allowed to go on and complete the contracts
41 would have been, for the one thousand horses to be delivered at Indianapolis, $ per horse, and for the nineteen hundred horses to be delivered at Columbus, $ for each and every horse to be delivered.

42 In the Court of Claims of the United States. December term.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936.

Upon the hearing of this cause, the defendants, by their Attorney General, ask the court to find the following as the facts of the case:

1. On the 9th day of January, 1865, the claimant in this case filed in the Court of Claims his petition, in the words and figures following:

To the hon. the judges of the Court of Claims:

The petition of John Spicer, a citizen of Illinois and resident of Chicago, respectfully represents: That, on the 4th day of February, 1864, at Washington City, he entered into a special contract with Captain James A. Ekin, chief quartermaster of the cavalry bureau, duly authorized and acting for the United States, whereby your petitioner agreed to deliver at the Government stables in Indianapolis,
43 Indiana, by or before the fifteenth day of March, then next, one thousand cavalry horses, of the kind described in said contract. And on said fourth day of February, 1864, your petitioner entered into another special contract with the said Captain James A. Ekin, duly authorized and acting for the United States, whereby your petitioner agreed to deliver at the Government stables in Columbus, Ohio, by or before the 25th day of March then next; nineteen hundred cavalry horses of the kind described in said contract. And the United States agreed that the horses upon being delivered, should be examined and inspected without unnecessary delay, by a person or persons appointed by the United States, and that for each horse so delivered and accepted at Indianapolis, the United States should pay one hundred and thirty-five dollars, and for each horse so delivered and accepted at Columbus, Ohio, one hundred and thirty-four dollars. And your petitioner gave bond with approved sureties in a large amount—conditioned for the faithful performance of said contracts, copies of which contracts are hereto annexed, marked Exhibits A & B.

And your petitioner further shows, that, according to the custom

44 and usage of the trade in horses, those persons who, like your petitioner, undertake to supply to the Government large numbers of horses in very brief periods, are not themselves raisers or owners of such stock, except to limited extent; but are men, who, by their business connections, their knowledge of the country, their acquaintance with the sources of supply, and their command of capital, are able to purchase from numerous individuals small lots of horses to make up the aggregate required; and it is the custom and usage of the trade that the individual owner sells his horses to the contractor subject to Government inspection, and presents them to the Government officers for inspection on the contractor's account, and for all horses accepted on said inspection, the contractor pays the owner in cash on the spot, and the contractor takes the risk of the delay of payment from want of appropriations or prompt remittances, and of the forfeitures exacted if the contract be not fulfilled, and the depreciation of the certificates in which a portion of the price is always paid; all which responsibilities, risks, and contingencies and possible delays, the owners of small numbers of horses are unwilling to incur.

And your petitioner further shows that within a few hours after the execution of the said contracts—that is, on the afternoon of
45 said 4th day of February—your petitioner left Washington and proceeded to the Northwest, in order to collect and secure the large number of horses which he had engaged to deliver; but while at Chicago, on or about the 10th of February, he heard it reported that a regulation had been issued by the chief of the cavalry bureau at Washington, for the government of inspectors appointed to inspect horses delivered by contractors, whereby those inspectors were instructed to retain in the Government inspection-yard, all horses offered by the contractors, for the space of twenty-four hours before inspection, and if the horses were doubtful, to retain them from one to four days after inspection; and, in the meantime, to permit no person other than the Government employees, to have any access to them, and to charge the contractors with the cost of keeping the said horses during the time of their detention; and the inspectors were authorized, before returning to the contractors such horses as should be rejected, to brand upon the shoulder of any such horse, a conspicuous and indel'ible mark, signifying that the animal had an incurable disease, or some concealed defect, and that the contractor or owner had fraudulently endeavored to impose him upon the Government; and to brand upon the hoof another mark, signifying that the animal was under age, or in poor condition, or temporarily injured.

Your petitioner then repaired to Columbus, Ohio, and at that
46 place, on or about the 15th day of February, 1864, he was informed by Captain Fielding Lowry, quartermaster of the cavalry bureau—the officer charged with the duty of receiving horses delivered by contractors at that place—that instructions of the tenor above set forth, had been issued by the cavalry bureau at Washington, under date of February 5th, 1864, and that no horses would be received from your petitioner unless he would deliver the horses subject to the said regulation.

And your petitioner further shows that the conditions imposed by this regulation, and enforced by the officers charged with the duty of receiving horses purchased by the cavalry bureau at Columbus, Ohio, and Indianapolis, Indiana, were contrary to the custom and usage of the trade in horses, and contrary to the practices and usage of the Government in purchasing horses, and were not warranted by the

terms, expressed or implied, of the contracts above-mentioned, and would, if acceded to, have involved your petitioner in ruinous losses, wherefore your petitioner refused to accede to said conditions, and the United States officers notified him that no horses would be received from him unless he would submit to said conditions.

And your petitioner further shows that even if he had been willing to deliver the comparatively small number of horses which he then had, subject to the regulation aforesaid, he found, on conferring with the owners of horses, that it was utterly impracticable to induce
47 them to deliver horses on those conditions, and thereby incur the risk of having their horses injured by neglect or accident in the public inspection-yards, and the further risk of having them disfigured, and their value depreciated by the branding aforesaid.

And your petitioner further shows that he was able and ready and willing to deliver the horses required by the said contracts, according to the time, intent, and meaning thereof, and offered so to do, and that he was prevented from performing said contracts by the refusal of the authorized officers of the Government to examine and inspect the horses according to the terms and requirements of said contracts, as hereinbefore stated.

And your petitioner further shows that he made repeated applications to the proper officers to revoke the instructions hereinbefore stated, and to consent to have your petitioner's horses examined and inspected according to the custom, usage, and practice of the trade, and according to the true intent and meaning of the contracts, but without effect.

And your petitioner further shows that, having consumed almost the entire time allotted for the performance of the contracts in fruitless efforts to induce the officers of the Government to revoke the instructions hereinbefore mentioned and fruitless endeavors to procure the required numbers of horses to be delivered under those instruc-
48 tions, your petitioner repaired to Washington, and reported at the cavalry bureau, on the 26th day of March, 1864, the day after the expiration of the period allotted for delivering horses, and then and there explained to the officer in charge thereof, General Wilson, how the instructions hereinbefore mentioned had prevented the performance of the said contracts, and General Wilson appeared to be satisfied with the explanation; nevertheless, within an hour after leaving the bureau, your petitioner was arrested by the military authorities upon the request, as he is informed and believes, of the said General Wilson, and was closely confined in the Old Capitol Prison, where he was detained for the space of seventy-eight days; and during the first ten days of the time he was not permitted to have any communication with persons outside the prison, but with the superintendent thereof only, and, after some time spent in prison, your petitioner was brought to trial before a military commission on a charge of having wilfully neglected to fulfil his said contracts. The sentence of said military commission has not been promulgated, so far as your petitioner is informed, but he was released from prison on the 12th day of June.

And your petitioner further shows that, at the time he was arrested, as hereinbefore stated, he had on hand about sixty horses, at a daily expense of $160 *dollars* and he had about $14,000 *dollars* due
49 him for horses sold and delivered to a dealer, and he had obligations in bank falling due to the amount of from $75,000 to $100,000 *dollars*, and by being suddenly taken from his business and prevented from giving any directions, these heavy and important interests, he was subjected to great distress and anxiety of mind; and for want of care

and attention and proper management he lost upon the horses he had on hand when imprisoned not less than fifteen thousand dollars, and he also lost the debt of fourteen thousand dollars which he would have secured had he been at liberty; and in credit and reputation he sustained damage to a very large amount.

And your petitioner further shows that, in his efforts to furnish the horses required by the contracts hereinbefore set forth, he incurred all the expense and expended all the time and labor that would have been necessary to have performed his said contracts had the United States performed the covenants on their side to be performed, and that by the failure and refusal of the United States to perform their covenants for the examination and inspection of the horses to be delivered by your petitioner and by the breach of contract on their part in refusing to provide for the examination and inspection of the horses to be delivered by your petitioner otherwise than on condition that he would de-
50 liver horses subject to the regulations hereinbefore stated, your petitioner has sustained damages to the amount of forty thousand dollars, and he claims that sum in this suit. And your petitioner further shows that he has always borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the said Government.

JOHN SPICER.

[Stamp.]

DISTRICT OF COLUMBIA,
County of Washington:

On this 22ond day of December, 1864, before me, Edgar H. Bates, a justice of the peace, in and for the county aforesaid, personally appeared John Spicer, and made oath to the Holy Evangely of Almighty God, that no arrangement or transfer of the claim in the foregoing petition stated, has been made, or of any part thereof, or interest therein, and that he is justly entitled to the amount therein stated after allowing all just credits and offsets and that he believes the facts as stated in said petition are true.

(Signed) EDGAR A. BATES, [SEAL.]
Justice of the Peace.

To this petition the defendants demurred; the demurrer being filed on the 5th day of September, 1865, and being in the words and figures following:

51 In the United States Court of Claims. October term, 1865.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936.

The United States, by its solicitor, comes and says that the said claimant's petition, and the matters and things therein stated and set forth are not sufficient in law, for the said claimant to have or maintain his aforesaid action. Wherefore, the United States pray judgment, if they shall make any other or further answer to the matters and things set forth in claimant's petition, &c.

JOHN J. WEED,
Ass't Solicitor for the U. S.

And the United States points out and shows to the court, specially, the following causes of demurrer:

1st. That the petition shows that the claimant entered into special contracts with Col. James A. Ekin, an agent of the United States, by which said claimant undertook, and contracted to furnish for the use of the Army of the United States, two thousand horses, to be deliv-
52 ered at a certain time and place, and for a certain sum therein specified; and that the claimant never delivered, or offered to deliver any portion of the horses which he so contracted to furnish to the United States.

2nd. It is not shown or alleged in said petition, that the United States ever at any time, neglected or refused to receive or inspect any horses which the claimant offered under his said contracts.

3rd. That the regulation or order issued from the chief of the cavalry bureau, to the inspectors of horses offered for sale to the Government, did not require *that* the claimant to furnish horses of any other of different quality than specified in the invitation for proposals under which the claimant became a bidder, as well as in the contract which the claimant executed.

4th. That the regulations issued from the cavalry bureau to inspectors of horses, which the claimant avers prevented the fulfillment of his contract, were not issued for the purpose of requiring the claimant to furnish horses different from those specified in his contracts.

5th. The petition shows that the claimant was to complete the
53 delivery of the horses which he had contracted to deliver under his contracts, on the 15th and 25th days of March, 1864, respectively; but that up to that time he had neither delivered nor offered to deliver to the Government inspector, any portion of the horses he had contracted to furnish; and that by reason of such failure to fulfill his said contract, the claimant was arrested and confined in the Old Capitol Prison. But the petition neither avers or shows that the claimant was not rightfully arrested for neglect of duty as a Government contractor.

6th. Even if the arrest of the claimant and his detention in the Old Capitol Prison was wrongful and unauthorized, this court has no jurisdiction to afford the claimant any relief. His only remedy is against the officer who caused his wrongful arrest and detention.

7th. That said petition is in other respects insufficient, uncertain, and informal.

JOHN J. WEED,
Ass't Solic'tor for the U. S.

At the time this demurrer was filed, the rules of the Court of Claims required that the solicitor for the United States, when he demurred to a petition, should specifically set forth the grounds of the demurrer.

54 2. At the October term, 1865, of this court, the said cause came on for hearing upon the said petition and demurrer; whereupon the following order was made and entered of record:

"And now, to wit, 14th February, 1866, the court, upon due consideration of the premises, do sustain the said demurrer, and do order, adjudge, and decree that the said petition be dismissed."

3. On the 17th day of April, 1869, the claimant filed in the Court of Claims his petition in this cause.

4. On the 4th day of February, 1864, the claimant entered into two several contracts with James A. Ekin, chief quartermaster of the cavalry bureau, whereby he agreed to deliver to the United States cer-

tain cavalry horses, at the times, for the price, and upon the terms and conditions, set forth in the said contracts, copies of which are annexed to the claimant's petition, marked "Contract (A.,)" and "Contract (B.)"

5. On the 5th day of February, 1864, and before the claimant had delivered any horses under his said contracts, Brigadier General James H. Wilson, chief of the cavalry bureau, a bureau in the Department of War, which had charge of the purchase of all cavalry horses for the Army of the United States, issued a circular letter, containing instructions for inspectors of cavalry horses, a copy of which circular letter is annexed to the claimant's petition, marked "C." When this
55 circular letter of instructions came to the knowledge of the claimant he went to Gen. Wilson, and endeavored to induce him to withdraw, or change, or modify the instructions therein given. This Gen. Wilson refused to do, and his decision in the matter, and the instructions, given in the said circular, were adhered to and acted upon by the inspectors of cavalry horses in Indianapolis, Indiana, and in Columbus, Ohio, during the time limited in the said contracts for the delivery of the horses thereby agreed to be delivered.

6. The claimant, when he entered into the contracts aforesaid, did not have or own any horses; and during the time limited by the terms of the said contracts for the delivery of the horses, he did not, either at Indianapolis, Indiana, or at Columbus, Ohio, tender any horses under the said contracts, nor did he purchase any horses for delivery under the said contracts.

Upon the foregoing proposed findings of the defendants is the following endorsement by Chief Justice Drake to wit:

1st, 2d, & 3d findings refused, because the facts are already part of the record.

4th, 5th, & 6th findings refused, because the facts are already set forth in the special verdict found by the court.

56 In the Court of Claims.

JOHN SPICER
vs.
THE UNITED STATES. } No. 5936.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney General, for defendants, for the allowance of an appeal, as filed in the clerk's office the first of May, 1871, and of the order of the court, allowing the same; of the findings of fact, and the conclusions of law thereon, on which the court founded its judgment; and also the proposed findings of the claimant and defendants respectively.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this sixth day of December, A. D. 1871.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on the cover:) No. 483. The United States, appellants, vs. John Spicer. Court of Claims. Filed 6th December, 1871.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES, APPPELLANTS,
vs.
SAMUEL S. SMOOT. } No. 264.

SAMUEL S. SMOOT, APPELLANT,
vs.
THE UNITED STATES. } No. 265.

APPEAL AND CROSS APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES, APPPELLANTS, *vs.* SAMUEL S. SMOOT. } No. 264.

SAMUEL S. SMOOT, APPELLANT, *vs.* THE UNITED STATES. } No. 265.

APPEAL AND CROSS APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

The essential facts found by the Court of Claims are as follows:

"I. The claimant, on the 5th February, 1864, at the city of Washington, entered into an agreement with Capt. James A. Ekin, chief quartermaster of the cavalry bureau, a bureau of the War Department, for the sale of 2,500 cavalry horses at St. Louis, Missouri, being the contract set forth and declared upon in the petition. The defendants, by their officer, the chief of the cavalry bureau, shortly afterward issued the order dated February 5, 1864, annexed to, and forming part of, the petition. The order was promulgated at St. Louis, on or before the 1st March, 1864, but the inspection of cavalry horses, which it required, was not enforced at St. Louis, as against contractors holding prior contracts. The claimant had knowledge of the order, and was thereby led to

believe that the defendants' quartermasters, at St. Louis, would require and exact the inspection of horses which it enjoined and prescribed, but the claimant did not attempt to perform under his contract at St. Louis, nor tender the horses for inspection, nor apply to the defendants' officers to suspend the operation of the order at St. Louis in order that he might perform, nor did he own or transport any horses to St. Louis, nor was he ready to perform at that point.

"II. The claimant also entered into the second contract with defendants' quartermaster, set forth and declared upon in the petition for the sale of 2,000 cavalry horses, at Chicago, Illinois, dated the 5th February, 1864. The order requiring a new inspection of horses, issued by the chief of the cavalry bureau, was promulgated and enforced at Chicago, on or about the 1st March following, and the defendants' quartermasters at that point were forbidden to receive or accept horses on all contracts unless subjected to the inspection which the order prescribed. And the chief of the cavalry bureau then being in Chicago, was applied to by various contractors to waive or suspend the new inspection required in favor of prior contractors, all of which applications he refused. The claimant proceeded to Chicago, by his agents, and was able and willing to perform by delivering the horses within the time prescribed by the contract, subject to the inspection by the contract prescribed, but was unwilling to deliver any horses subject to the inspection required by the order. The claimant did not possess any horses in Chicago, nor tender any to the defendants' quartermasters at that place, nor apply to the chief of the cavalry bureau to waive the inspection ordered; but the claimant possessed ample time and means for procuring horses and fulfilling the contract, and he regarded the order as a renunciation by the defendants of their agreement, and he had knowledge of the refusals of the chief of the cavalry bureau to waive the inspection or suspend the operation of the order against prior contractors.

"III. The fair profits which the claimant would have made on the 2,000 horses to be delivered at Chicago, if

he had been allowed to perform according to the terms of his contract, would have been the sum of $10.00 a horse."

The Court of Claims, as a conclusion of law, decided that the claimant should recover upon the contract set forth in the second finding of fact the sum of $20,000; and that as to the contract set forth in the first finding of fact, judgment should be entered for the defendants.

SPECIFICATION OF ERROR.

We submit that the Court of Claims erred in granting judgment for the claimant as above stated; because it appears, from the findings of fact of said court, that his contracts with the United States upon which his suit was brought were not fulfilled by him, in whole or in part, and that no just or reasonable cause existed for their non-performance.

ARGUMENT.

This case is identical, in the legal question involved, with that of *United States* vs. *Wormer*, (13 *Wallace* 25,) where the decree of the Court of Claims was reversed, and that court directed to dismiss the petition.

The fourth article of the contract referred to in the second finding of fact is as follows:

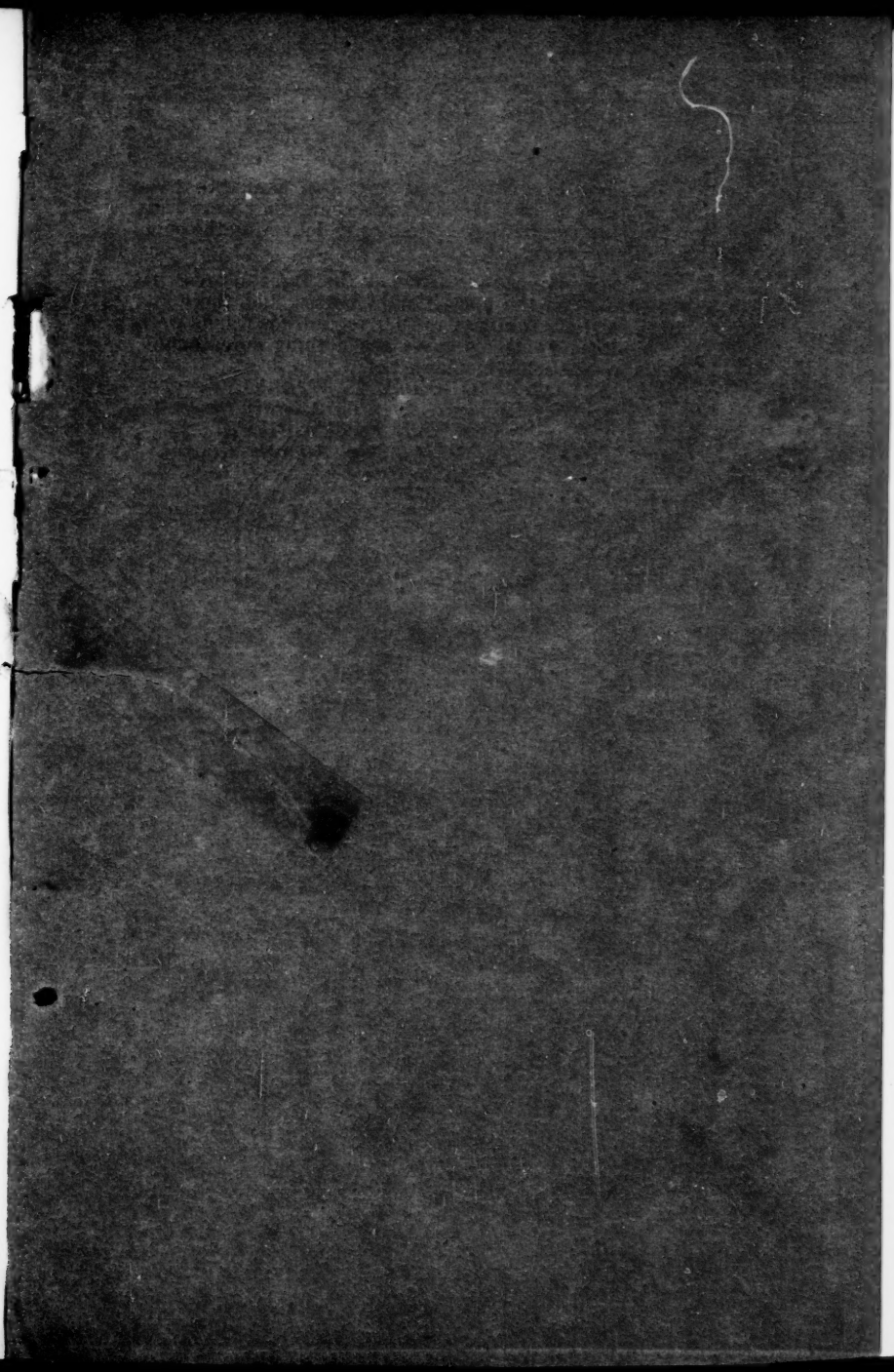
"It is agreed that the horses, upon being delivered, shall be examined and inspected without unnecessary delay by a person or persons appointed by the United States; and after such inspector shall have certified that they are in all respects as contracted for, and fully equal to the specifications aforesaid, they shall be received and become the property of the United States; and all such horses as may be condemned and rejected by said inspectors shall be removed from the Government stables within one day after the contractor shall have been notified of said rejection."

The instructions of the War Department directing the manner in which the inspection should take place were dated February 5, 1864, and the contract referred to was

of the same date. These instructions are similar to those complained of in *Wormer's case*, where they were thus referred to by Mr. Justice Bradley in delivering the opinion of the court:

"The Government clearly had the right to prescribe regulations for the inspection of horses, and there was great need of strictness in this regard, for frauds were constantly perpetrated. We see nothing unreasonable in the regulations complained of."

GEORGE H. WILLIAMS,
Attorney General.
WILLIAM McMICHAEL,
Assistant Attorney General.



IN THE

Supreme Court of the United States,

December Term 1872.

THE UNITED STATES, APPELLANTS,
vs.
SAMUEL S. SMOOT, APPELLEE. } *No.* 264.

SAMUEL S. SMOOT, APPELLANT,
vs.
THE UNITED STATES, APPELLEES. } *No.* 265.

Appeal and Cross-Appeal from the Court of Claims.

BRIEF ON THE PART OF SMOOT, APPELLEE AND APPELLANT.

The appeal and cross-appeal arises out of the two contracts which are set forth on the first, second, and third pages of the record, and for the breach whereof by the United States damages were asked by Smoot in the Court of Claims.

Both of these contracts were executed the same day, February 5, 1864. One to deliver twenty-five hundred cavalry horses at St. Louis, and the second to deliver two thousand cavalry horses at Chicago, at the Government stables in each place; of certain qualifications set forth in the contracts, and subject to the inspection provided for in the fourth article, which is as follows:

Fourth. "It is agreed that the horses, upon being delivered, shall be examined and inspected without unnecessary delay, by a person or persons appointed by the United States, and after such inspector shall have certified that they are in all respects as contracted for and fully equal to the specifications aforesaid, they shall be received and become the property of

the United States, and all such horses as may be condemned and rejected by said inspectors, shall be removed from the Government stables within *one day* after the contractor shall have been notified of said rejection."

The contracts were in all respects alike, except as to the place at which the horses were to be delivered, and the time of delivery, which was limited to forty days in St. Louis and fifty days in Chicago, and the price of the horses, which differed in the two places.

These differences are not essential to the questions which arise in the case.

The court of claims found in favor of Smoot, the petitioner, for breach of contract for the delivery of horses in Chicago, with damages in the sum of $20,000; and for the United States as to the contract in St. Louis.

Hence the appeal and cross-appeal, the United States appealing against the former judgment, and Smoot against the latter.

BRIEF STATEMENT OF THE FINDING OF FACTS ESSENTIAL TO THE CASE.

First. The contracts were duly executed.

Record, pp. 11 and 12.

Second. That the claimant "during the existence of the contracts was possessed of means and credit to comply with the stipulations on his part, and that himself and his agents went to Chicago and other parts of the West to make, and did make, all necessary arrangement to carry them out, except the actual procuring of the horses."

Record, VII. Finding of Fact, pp. 12 and 13.

Third. That he repeatedly offered to go on with the contracts upon the conditions and inspections required by the practice of the Government, as known to him at the time he entered into the contract

Record, VIII. Finding of Fact, p. 13.

Fourth. "That at the time the contracts were entered into, and long prior thereto, the mode of inspection of horses purchased by the Government had been for horses to be presented and immediately examined in the presence of the owner, and if satisfactory, they were accepted, and if unsatisfactory, they were rejected and returned to the owner without delay, expense, or blemish."

Record, V. Finding of Fact, p. 12.

Fifth. By an order dated on the same day as these contracts, but not promulgated in Chicago or St. Louis until the first of March, or known to the defendant till then, the Government ordered another and different mode of inspection from what had been the practice and custom of the Government theretofore, as stated in the above fifth finding of fact, which requires:

a. "That each horse shall be placed in the inspection yard twenty-four hours before inspection, after which time, every person, except the inspector and his assistants, are to leave the yard, not to re-enter it or handle the horses until the inspection and branding has been completed."

Record, p. 5.

b. "That all horses presented that are manifestly an attempt at fraud on the Government because of any incurable disease or any distemper whatever, shall be branded on the left shoulder with the letter R."

Record, p. 5.

c. "Horses that are rejected for being under age, in poor condition, or temporarily injured by transportation or otherwise, shall be lightly branded on the front hoof near the coronet with the letter R, not to exceed three-quarters of an inch.

d. That any horse once rejected, that is presented to the Government without notice to that fact, be considered and deemed fraud upon the Government, and branded on the left shoulder as fraud."

Record, p. 6.

e. When horses are doubtful before branding, they may be kept three or four days under guard, *at the expense of the contractor*, and then disposed of by branding or otherwise, as the inspector may determine.

Record, p. 6.

f. No mares will be accepted.

Record, p. 6.

These rules of inspection were promulgated by order of the Secretary of War, through the Chief of the Cavalry Bureau, J. H. Wilson, Brigadier-General, in charge of Bureau.

Record, p. 7.

The court of claims found that at the time the contracts were entered into, and for a long time prior thereto, the usual course of business in filling contracts of this kind, had been for the contractor to buy his horses subject to Government inspection, and that one effect of the order of the new rules of inspection was to create a change in this course of business, and, therefore, that no horses could be purchased by contracts subject to this new inspection.

Another effect was to impose upon the contractors considerable risk:

A. By being kicked and bruised.

B. By contagious diseases.

C. Loss of identity of the animal by putting the animal with other lots, so that in the event of rejection the same animals could not be returned.

D. The expense of keeping the animals during the four days.

E. Injury which might occur to horses from rejection brands, (being branded by hot iron.)

F. The branding of a rejected horse in the manner prescribed by the new order would greatly lessen his market value.

Record, VI. Finding, p. 12.

Seventh. After ascertaining the effects produced by the

order, the claimant caused application to be made to the office of the Bureau of Cavalry for modification of this order, and repeatedly offered to go on and fill the contract if these objectionable features could be removed. He was referred to the Chief of Bureau, then absent at Chicago, and the matter was presented to him there, and he thereupon decided not to revoke or modify the order.

Record, VIII. Finding of Fact, p. 13.

Eighth. The same facts are found in regard to the contract for St. Louis, except that the order was not enforced at St. Louis as against contracts dated prior to its promulgation. But of this neglect to obey the order of the War Department Smoot had no knowledge, but did believe that the order was enforced there, as well as at Chicago, but did not ask the inspecting officers to disobey the orders in St. Louis, in order that he might fulfill his contract, and therefore did not attempt to transport horses to St. Louis, in accordance with his contract.

Record, p. 11.

It will be observed that these findings of fact are entirely different, and present a different question from that in WORMER'S CASE, 13, *Wallace*, 25, *relied upon by the Attorney General.*

RESUME OF THE FACTS FOUND.

Smoot made a contract with the United States to deliver *horses* to be inspected under his personal supervision at once, which he was obliged to take away within one day, according to a well-known practice, custom, and order of inspection used by the Government for a long period, in reference to which the contract was made.

This inspection enabled him to buy horses of their owners subject to inspection; he was able, willing, and desirous of fulfilling that contract so made, and made his arrangements

and incurred expenses for that purpose, and he has always remained so—willing and desirous of fulfilling the contract.

After he entered into the contract, the Government issued an order of inspection, which imposed upon him new and onerous conditions, and made changes in his contract, which are found in fact to have prevented his fulfilling the contract, and, indeed, it was *impossible for him to fulfill the contract under them*

They imposed on him the necessity and expense of subsisting the horses four days.

To leave them in the Government corral, mixed with other horses for that time, exposed to disease, exposed to injury by kicks and otherwise in a drove with thousands of other horses.

To the liability of not being able to receive back the same animals in case of rejection.

When received back, to have every one, that, from any accident occurring in transportation, or not in the view of the inspector coming up to certain conditions, branded on the forefoot with an "R."

In case a horse was found incurably diseased, or, in the judgment of the inspector, there was any purposely concealed defect, then the horse was to be branded on the shoulder with an "R," with a hot iron, thereby rendered sore and lame, so that the contractor could not return him in the same condition in which he took him from the person of whom he purchased.

Thus, at the will or caprice of an inspector, *the animal was to be branded as a fraud, and the contractor of the animal condemned* ex parte *as a defrauder of the Government.*

If, from any cause, being out of condition, or from accident in transportation, the horse was not at first accepted, and the brand on the foot was not observed by the inspector, although the horse might afterwards be brought to a perfect condition, every other inspector in the United States was to brand that horse when presented again, even if the foot-brand was unknown to the contractor, *as a fraud, and the contractor as a defrauder.*

The case finds that Smoot applied to the War Department for a modification of this order, promulgated after his contract was executed, and not brought to his knowledge until twenty-three days out of the forty in which he was to deliver his horses had elapsed, during which time he was collecting them.

The new order of inspection rejected *mares*, although the contract made no such exception, calling for horses only.

Smoot applied to the War Department to modify the order, and was referred to the Chief of the Cavalry Bureau at Chicago, and there was met with the information that the Chief of the Cavalry Bureau, in case of other contractors, had refused to modify that order.

Smoot repeatedly expressed his willingness and desire to go on and fulfill his contract, to save himself from loss if the order could be modified.

Questions of Law.

The question, therefore, submitted to the court is whether this order of the Government thus onerous, impracticable of execution, as shown by the facts, and found as a fact to render the performance of the contract impossible by Smoot, is, in law, a breach of the contract on the part of the Government, so as to render the United States liable for such damages as may be proved to be sustained by the contractor, which the court have found to be *twenty thousand dollars*—a small amount upon a contract which calls for an expenditure of $247,500, *nearly a quarter of a million dollars*—eight per cent. only of that amount.

There needs neither citation of authorities nor argument to prove that if one party to a contract, by his own act, interposes and enforces onerous conditions upon the manner of the performance of a contract not contemplated by the other party thereto at its inception, and refuses to permit its performance unless those conditions are complied with, that a breach of the contract is thus made by the party so refusing, and he is

liable to the party capable and willing to perform on his part, not only for all that he has lost in attempting to perform, but for all the fair profits he would have made in its performance.

Neither the Government nor an individual can be permitted to alter any essential element of a contract after it has been entered into *a fortiori, when, as it is found as in the case at bar, the conditions so imposed render the performance of the contract impossible.* (See Record, p. 12.) "And thereafter no horses could be purchased by the contractors subject to this new inspection."

These findings of fact as to the onerous nature of the imposed conditions, which are wholly overlooked by the Attorney-General in his brief, entirely distinguishes this case from Worner's case cited by him.

In that case but two facts were found bearing on this point: *First*, the contract; *second*, the order of inspection.

All the facts before the court there, were, that the contract was executed, the order regulating the inspection issued.

The court was asked, as a matter of law, to infer, as did the court below, that the regulations of the inspection were "*unreasonable.*"

This clearly was a matter of *fact*, and not of *law*. The order of inspection could not be known to the court to be unreasonable as a matter of fact. The case was silent on that subject.

It did not appear in that case even that, by the new order, there had been any substantial change from the former custom and practice of the Government in the inspection of horses, or that the changes, if any had been made, bore onerously on the contractors.

Looking on the record, page 12, it will be found that the War Department decided the contract to be an unreasonable one *in fact.*

> See opinion of Judge Advocate General Holt, pages 8 and 9 of the Record.

"The receipt of horses, under the new regulations, at the

depot in Chicago fell off from an average of thirty-two hundred horses a month to *twenty-two only* in the month of February," *i. e.*, after the order was promulgated. * * * * "The accused was prevented from the performance of his contract in great part at least by the action of Government officials, which they were mistaken in supposing was warranted by law." * * * * "The inspector who had ventured to brand as directed, or the superior who so ordered, would have been liable to an action at common law if it were without the consent of the owner; and the Government cannot force a contractor to deliver his property up to be subjected to a wrong. The circular not only introduced new conditions into the agreement, but unlawful conditions."

The order of inspection was found to be impracticable of execution, so that at St. Louis it was not enforced. (Record, p. 11.) It was relaxed as to the only other contractor who did perform his contracts.

Record, p. 9.

CASE ON CROSS-APPEAL—SMOOT *vs.* THE UNITED STATES.

This stands upon a precisely similar contract in all material provisions, except as to the time of performance and price of the horses, as *in* the contract for delivery at Chicago.

The distinguishing fact, upon which it would seem that the court below found against Smoot, was, that he did not apply at St. Louis for *a modification of the order of inspection*, nor did he buy and transport to St. Louis any horses in fulfillment of the contract.

The only question of law, if the court sustain our views in the case of the contract at Chicago, which can arise here, is whether, under the facts stated, Smoot was bound to tender horses at St. Louis, or apply there for the disobedience of the order of inspection.

The case finds as fact, that the order was suspended by the subordinate officers there as to another contractor; but it also finds, that Smoot applied to the War Department for its relaxation, and was referred to the Chief of the Cavalry Bureau at

Chicago for his answer, and there learned that it would not be modified or relaxed. And no reason in fact or law is found why it should be suspended at St. Louis if not in Chicago.

Was Smoot then bound to apply it at St. Louis in expectation that the order would be there disobeyed? The court will notice that this was an order from the War Department, solemnly promulgated for the direction of the whole Government in this regard. He had applied to that Department, been referred to the chief officer of the proper bureau for his answer, and had received it. Could he then, in law, be compelled to apply at St. Louis for a suspension of the order by the subordinates there? Had he not a right to suppose that the order, being a general one, would be generally enforced where no reason appeared for the exception?

Is he bound, in law or in fact, to suppose that the officers at St. Louis would disregard an order which was enforced at Chicago? Ought he to be required to suppose or believe and to act on that belief, that he could fulfill his contract at St. Louis in disobedience of the order? Is he not excused from so believing, from the fact that he had applied to the head of the Government for a modification of the order and had been refused? Had he not a right to believe that this was one Government which would not have one law as a rule of its action "at Athens and another at Rome?"

If, then, he was not obliged to apply for a modification of the order at St. Louis, would the law compel him to put himself to great expense to attempt the impossibility of performing his contract there? *Ad vana seu impossibilia lex non cogit.*

He found it impossible, either to comply with his contract or to procure a modification of the order at Chicago. The contract and order, as well as the Government, were the same at both places. How, then, can it be held to be laches on his part not to have made the application?

We submit, therefore, that the judgment of the court here should be to affirm the decree in the court below; or, if the

court find any difficulty in the principles upon which the court assessed the damages, send it back for a new assessment and reverse the judgment in the court below upon the St. Louis contract, the subject of the cross-appeal, and send it back for assessment of the proper damages for breaches of the contract by the United States suffered in this behalf.

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